Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

BUD CASH, JR.,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, MOTION FOR CERTIFICATE OF APPEALABILITY

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2 TRF

ISSUES PRESENTED FOR REVIEW

I. IS A PETITIONER "IN CUSTODY" AND ABLE TO HAVE HIS PRIOR STATE COURT CONVICTION REVIEWABLE WHEN FINAL PURSUANT TO 28 U.S.C. § 2254 WHEN SAID CONVICTION IS BEING USED AS AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSE PRIOR TO CONVICTION?

II. WHETHER THE STATE WAIVED THE PROCEDURAL DEFAULT DEFENSE OF WHETHER THE DEFENDANT WAS IN CUSTODY BY NOT PRESENTING IT IN THE STATE COURTS?

III. WHETHER WAIVER OF RIGHT TO GRAND JURY INDICTMENT SHOULD BE PERSONAL AND COULD BE DONE ONLY BY AFFIRMATIVE WAIVER BY THE DEFENDANT HIMSELF?

LIST OF ALL PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceeding in the United States Court of Appeals for the Sixth Circuit whose judgment is sought to be reviewed in this case:

State of Tennessee

Bud Cash, Jr.

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OPINIONS BELOW

The United States District Court for the Eastern District of Tennessee at Chattanooga filed its Order on July 26, 1999, and denied his Petition and is unpublished and has been reproduced in the Appendix at pp. 2a-5a. The United States Court of Appeals for the Sixth Circuit denied his application for a certificate of appealability on December 27, 1999, and is unpublished and has been reproduced in the Appendix at p. 1a.

SUPREME COURT JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit denying a certificate of appealability was filed on December 27, 1999. (Appendix, at p. 1a). This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS CONSTRUED

The Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be

deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the United States Constitution:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, § 6 of the Tennessee Constitution:

That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

Article 1, § 14 of the Tennessee Constitution:

That no person shall be put to answer any criminal charge but by presentment, indictment or impeachment.

STATEMENT OF THE CASE

After having exhausted his remedies in State court through the State post-conviction procedure, the Petitioner filed his writ of habeas corpus in the United States District Court in Chattanooga, Tennessee on July 7, 1998. (Record 1) On August 3, 1998, the Court ordered the State

to answer. (Record 2) After being granted an extension of time to respond, the State on September 16, 1998 filed a motion to dismiss raising for the first time its argument that the Petitioner was not in custody. (Record 6 and 7) That argument had not been raised in the State courts. On July 26, 1999, the District Court granted the State's motion to dismiss. (Appendix at pp. 2a-5a). On August 2, 1999, the Petitioner filed its Notice of Appeal and Motion for Certificate of Appealability. (Record 23) On December 27, 1999, the United States Court of Appeals for the Sixth Circuit denied the Motion for Certificate of Appealability filed by the Petitioner. (Appendix at p. 1a).

STATEMENT OF FACTS

The Petitioner is charged in the Bradley County Criminal Court in Cleveland, Tennessee for the State offense of possessing a handgun having been previously convicted of a felony involving the use of force or violence. Tenn. Code Ann. § 39-17-1307(b)(1)(A) (Appendix at pp. 6a-7a). That offense is a Class E felony in Tennessee. (Appendix at pp. 6a-7a). The Petitioner upon conviction would be a Range I Standard Offender meaning his range of punishment would be one to two years. The Petitioner exhausted his post-conviction remedies in State court as to the prior conviction which is an essential element of the pending offense. Upon the completion of exhausting his State remedies, the Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the United States District Court in Chattanooga, Tennessee. (Record 1) For the first time, the State raised a defense that the Petitioner was not in custody. (Record 6

and 7) The United States District Court granted the State's motion to dismiss holding that the Petitioner was not in custody even though the Petitioner is currently facing a charge for which the prior offense is an essential element. The District Court went on to hold that if convicted in State court, the Petitioner could bring this petition once again in federal court. (Appendix at pp. 2a-6a). The District Court did not consider, however, that the Petitioner would have served his sentence of one to two years long before he would ever be able to procedurally test this conviction in federal court after conviction.

The factual basis for the Petition itself was that the indictment was amended to charge a new offense without the personal waiver of the right to grand jury indictment by the Petitioner himself. The proof at the evidentiary hearing in State court established that counsel for the Petitioner consented to the amendment without the effective consent of the Petitioner and certainly without his affirmative personal consent.

SUMMARY OF ARGUMENT

The State raised it procedural defense alleging that the Petitioner was not in custody for the first time in federal court. To allow the State to raise a procedural defense for the first time in federal court when the Petitioner is required to raise all of his grounds in State court so that they may be exhausted is certainly unfair and deprives the State courts of the opportunity to address the procedural defenses in their own forums.

The holding by the district court that the Petitioner was not in custody is incorrect in that he is currently facing a criminal charge of possessing a handgun while having been previously convicted of a felony involving force or violence. It is the previous felony of force or violence which is an essential element of that offense which this habeas corpus petition addresses. He is currently on bond for that offense which is pending. Further to hold that he is not in custody would deprive him of the only opportunity he has to test the prior conviction in federal court because he would have served his sentence of one to two years long before he would procedurally be able to get into federal court again.

The substantive part of the Petitioner's habeas corpus petition alleges that he did not personally and affirmatively waive his right to indictment by grand jury. The effective implied waiver by silence of his attorney without consent of the Petitioner should not be treated as an effective waiver of this important constitutional right to be indicted only by grand jury.

ARGUMENT

I. IS A PETITIONER "IN CUSTODY" AND ABLE TO HAVE HIS PRIOR STATE COURT CONVICTION REVIEWABLE WHEN FINAL PURSUANT TO 28 U.S.C. § 2254 WHEN SAID CONVICTION IS BEING USED AS AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSE PRIOR TO CONVICTION?

The District Court held that the Petitioner was not "in custody." The Petitioner has been charged with the

offense of possession of firearms by one who has a prior conviction for a violent felony. It is this felony that serves as the predicate for that offense. Certainly this meets the criteria of "in custody" as being one who is subject to restraints not shared by the public generally. *Hensley v. Municipal Ct.*, 411 U.S. 345 (1973); *Jones v. Cunningham*, 371 U.S. 236 (1963); *Dickerson v. Guste*, 932 F.2d 1142 (5th Cir.), *cert. denied*, 112 S. Ct. 214 (1991); *Fernos-Lopez v. Fi arella-Lopez*, 929 F.2d 20 (1st Cir.), *cert. denied*, 112 S. Ct. 244 (1991); *Steinberg v. Police Court*, 610 F.2d 449 (6th Cir. 1979). To hold otherwise would certainly put the Petitioner in a catch 22 that he could not challenge his conviction when being used to enhance a sentence until he was serving and probably will have already served the additional sentence.

In addition, one who is on bond on a charge is in custody for purposes of a habeas corpus proceeding. *Saylor v. Cornelius*, 845 F.2d 1401 (6th Cir. 1988); *United States ex rel. Scranton v. New York*, 532 F.2d 292 (2nd Cir. 1976).

To say that the Petitioner can test this conviction in federal court after conviction is a fiction. If convicted, the Petitioner would be subject to a punishment of one to two years under Tennessee law. Meaning that he would have served his sentence long before this matter could be procedurally ripe for consideration by the district court. This is the only time, therefore, that the federal courts can examine the issues contained in the Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

II. WHETHER THE STATE WAIVED THE PROCEDURAL DEFAULT DEFENSE OF WHETHER THE DEFENDANT WAS IN CUSTODY BY NOT PRESENTING IT IN THE STATE COURTS?

If not presented in a timely fashion, a defense of procedural default is waived because it is an affirmative defense. *Trest v. Cain*, 118 S. Ct. 478 (1997); *Lambrix v. Singletary*, 117 S. Ct. 1515 (1997); *Gray v. Netherland*, 518 U.S. 152 (1996); *McCleskey v. Zant*, 499 U.S. 467 (1991); *Collins v. Youngblood*, 497 U.S. 37 (1990); *Granberry v. Greer*, 481 U.S. 129 (1986). It is certainly only fair to require the State to raise any procedural defenses that it has in State court just as the Petitioner has the burden to raise all of his grounds in State court so that the State courts can properly review them. To wait until federal court to raise a procedural defense deprives the State of the opportunity of addressing said defense in its own forum.

III. WHETHER WAIVER OF RIGHT TO GRAND JURY INDICTMENT SHOULD BE PERSONAL AND COULD BE DONE ONLY BY AFFIRMATIVE WAIVER BY THE DEFENDANT HIMSELF?

Under established Tennessee law, absent either grand jury action or written waiver of the guarantee to the right to an indictment, no conviction can be valid. *State v. Brackett*, 869 S.W.2d 936, 938 (Tenn. Crim. App. 1993) (citing *State v. Morgan*, 598 S.W.2d 796 (Tenn. Crim. App. 1979)). *Morgan* appears to be controlling authority regarding the waiver of the right to an indictment. An indictment is jurisdictional in a criminal case and without a

valid indictment no prosecution can be valid. 598 S.W.2d at 797. The court required a written waiver. *Id.*, at 797-798. This writing requirement appears to be absolute and constitutionally grounded. As the court states, "these constitutional rights [Tenn. Const., Art. 1 §§ 6, 14] may be relinquished only by a valid written waiver." *Id.*, at 798. *Morgan* has been fairly consistently followed and applied without regard to circumstances. As the Court of Criminal Appeals stated in *State v. Ridley*, 791 S.W.2d 32, 34 (Tenn. Crim. App. 1990), "[o]ur rules and our case law require the relinquishment of [a defendant's] right to be in writing. That is, signed by the [defendant]. No amount of evidence will supply a signature when, all agree, none exists."

At the bottom of the requirement for a valid written waiver of the right to an indictment is the right to due process since conviction on an insufficient charge is an obvious denial of due process. *State v. Perkinson*, 867 S.W.2d 1, 5 (Tenn. Crim. App. 1992). Recognizing the jurisdictional nature of such errors, the court stated that they could be noticed at any time in the course of a case and that waiver does not apply when an indictment fails to assert an essential element of an offense. *Id.*, at 5-6.

Amendments are permitted, of course, under Rule 7(b), Tenn. R. Crim. P., with the consent of the defendant or, before jeopardy has attached, when the amendment will not charge an additional or different offense and the defendant is not prejudiced. (Appendix at p. 8a). *State v. Kirkland*, 696 S.W.2d 544, 545 (Tenn. Crim. App. 1983). See also *State v. Sherman*, 656 S.W.2d 47, 49 (Tenn. Crim. App. 1983). In *State v. Beal*, 614 S.W.2d 77, 80 (Tenn. Crim. App. 1981), the court appears to have found that Rule 7(b)

could be satisfied by implied consent but the court nowhere discusses *Morgan*. (Appendix, at p. 8a). Moreover, the Supreme Court has recognized that defects in an indictment may be waived if not raised prior to a plea on the merits. *State v. Berry*, 592 S.W.2d 260, 261-262 (Tenn. Crim. App. 1968) (sufficiency issue waived by failure to object before going to trial); *Murff v. State*, 425 S.W.2d 286 (Tenn. 1967) (implied waiver); *State v. Kennedy*, 649 S.W.2d 275, 279 (Tenn. Crim. App. 1982), *overruled on other grounds*, 691 S.W.2d 520, 522 (Tenn. 1984) (waiver by procedural default). The greater weight of Tennessee law appears to be that this waiver does not, however, apply to the legal insufficiency of the indictment, which can be raised at any time. *McLean v. State*, 527 S.W.2d 76, 82 (Tenn. 1975). *See also McCracken v. State*, 489 S.W.2d 48, 53 (Tenn. Crim. App. 1972).

Federal law on this issue is similar to Tennessee law in most respects. The corresponding federal rule of criminal procedure does, however, prescribe a formal procedure for the valid waiver of the right to an indictment. *See, e.g., United States v. Montgomery*, 628 F.2d 414, 416 (5th Cir. 1980). Not only must the waiver occur in open court, but the trial court has the obligation of affirmatively determining that the waiver was knowingly, understandingly, and voluntarily made. *United States v. Moore*, 37 F.3d 169, 173 (5th Cir. 1994). In *Moore*, the timing of the filing of a signed waiver under Rule 7(b) was at issue in ambiguous circumstances and substantial compliance was all that was required in light of the defendant's acquiescence in the procedure. *Id.* (Appendix, at p. 8a). In *United States v. Liboro*, 10 F.3d 861, 863-864 (D.C. Cir. 1993), the court was faced with ambiguous compliance

with Rule 7(b) but an executed waiver existed and the defendant had been personally addressed by the court on the issue. (Appendix, at p. 8a). A defendant should have to personally waive his right to grand jury indictment under the Fifth and Fourteenth Amendments to the United States Constitution.

Since the record in this case is clear that no written waiver was executed personally by the defendant at any point in the proceedings after a valid objection had been asserted to the indictment, Tennessee law would require a finding that the conviction on the amended count is invalid and that the trial court lacked jurisdiction over this charge. Tennessee Rule 7(b) does not appear to require any particular procedure; however, the written waiver, would appear to at least require some formality in assuring the voluntariness and validity of a waiver. (Appendix, at p. 8a). *Cf. State v. Neal*, 810 S.W.2d 131, 138 (Tenn. 1991), *overruled on other grounds*, 858 S.W.2d 879 (Tenn. 1993). Because the defendant was never personally addressed in any manner to assure that the waiver was valid, under state law, the defendant's counsel had no authority to waive the right on behalf of the defendant.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari or, in the alternative, a motion for certificate of appealability should be granted.

Respectfully submitted,

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APPENDIX

No. 99-6055

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BUD CASH, JR., Petitioner-Appellant,	)	
v.	)	ORDER
STATE OF TENNESSEE, Respondent-Appellee.	)	(Filed Dec. 27, 1999)

Before: MARTIN, Chief Judge.

Bud Cash, Jr., a Tennessee resident, appeals through counsel a district court order dismissing his petition for a writ of habeas corpus, filed under 28 U.S.C. § 2254. The filing of a notice of appeal has been construed as an application for a certificate of appealability. Fed. R. App. P. 22(b). Upon review, the application for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

BUD CASH, Jr., Petitioner,	)	
v.	)	NO. 1:98-CV-251
STATE OF TENNESSEE, Respondent.	)	*Collier*

ORDER
(Filed Jul. 26, 1999)

This is a petition for the federal writ of habeas corpus pursuant to 28 U.S.C. § 2254. In accordance with the accompanying memorandum opinion, respondent's motion to dismiss for lack of subject matter jurisdiction is **GRANTED**, (Doc. 6), and this petition is **DISMISSED**. The Court **CERTIFIES** that petitioner has failed to make a substantial showing of the denial of a constitutional right and **DENIES** him a certificate of appealability. Fed. R. App. P. 22(b).

SO ORDERED.

ENTER:

/s/ Curtis L. Collier
CURTIS L. COLLIER
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

BUD CASH, Jr., Petitioner,	)	
v.	)	NO. 1:98-CV-251
STATE OF TENNESSEE,	)	*Collier*
Respondent.	)	

MEMORANDUM OPINION

(Filed Jul. 26, 1999)

Petitioner Bud Cash, Jr, through his attorney, brings this application for the federal writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the constitutionality of his confinement under a 1991 state court judgment of conviction. The case is now before the Court on respondent's motion to dismiss on grounds of a lack of jurisdiction or, alternatively, procedural default. (Doc. 6). Petitioner opposes the motion. (Doc. 11). However, for reasons which appear below, respondent's motion will be **GRANTED**.

In moving to dismiss, the respondent specifically argues petitioner fails to meet the "in custody" requirement of 28 U.S.C. § 2254, and thus, there is no subject matter jurisdiction over petitioner's case. The respondent claims petitioner is not "in custody" pursuant to the challenged 1991 conviction because his sentence under

that conviction has fully expired.[1] Petitioner suggests he is "in custody" under the 1991 conviction because he has a new state criminal charge (for possession of firearms by one who has a prior conviction for a violent felony) and because the new charge, indeed, is based upon his prior aggravated assault conviction. Simply being charged on the basis of the 1991 conviction, according to petitioner, constitutes a collateral consequence of his 1991 conviction and renders him "in custody" for purposes of § 2254 jurisdiction. Petitioner's position is untenable.

Federal courts are authorized to grant a writ of habeas corpus to a prisoner in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2241(c)(3). Title 28 U.S.C. § 2254(a) provides as follows: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground he is *in custody* in violation of the Constitution or laws or treaties of the United States." *Id.* (emphasis added).

If, however, a conviction has been fully served, a habeas petitioner is no longer "in custody" under that conviction and a federal court lacks jurisdiction to set aside the conviction on the ground it was obtained in violation of the United States Constitution, even if the conviction may be used to enhance the sentence imposed upon a subsequent conviction. *Maleng v. Cook*, 490 U.S.

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[1] The 1991 aggravated assault conviction resulted in a sentence of six (6) years.

488, 492 (1989) (per curiam). After a conviction has completely expired, the collateral consequences of such a conviction are not enough to render him "in custody" under § 2254(a). *See id.* at 492.

Petitioner alleged in his petition the state was "seeking to try him using the challenged conviction in another case." Essentially, petitioner is attacking the constitutionality of his pending state criminal proceedings: He is not attacking an actual state court judgment of conviction. While physical custody is not required, *see, e.g., Jones v. Cunningham*, 371 U.S. 236 (1963) (holding that person on parole is "in custody" for purposes habeas corpus petition); *Hensley v. Minicipal [sic] Court*, 411 U.S. 345, 349 (1973) (bail), the Court can find no cases (and petitioner does not cite to any) in which the "in custody" requirement in 28 U.S.C. §§ 2241(c)(3) and 2254(a) has been read so broadly as to include mere criminal charges, even where the charges are based upon an allegedly unconstitutional prior conviction.

It may be the criminal charge against petitioner will be dismissed before or at trial or the fact finder may acquit petitioner of the charge. If this turns out to be the case, then petitioner will have no reason to seek habeas corpus relief. If, however, the charge is not dismissed or petitioner is not acquitted, it is a possibility, *after petitioner has been convicted and after he has exhausted his state court remedies*, he may apply for federal writ of habeas corpus, alleging his confinement under the second conviction is illegal because it is predicated upon the unconstitutional 1991 conviction. *See Maleng*, 490 U.S. at 492-93; *Schilling v. Franklin County Adult Probation*, No. 98-4002, 1999 WL 282659, *1 (6th Cir. Apr. 30, 1999) (unpublished);

Young v. Vaughn, 83 F.3d 72, 75 (3rd Cir), *cert. denied*, 117 S. Ct. 333 (1996); *Gamble v. Parsons*, 898 F.2d 117, 118 (10th Cir.1990).

For the foregoing reasons, respondent's motion to dismiss will be **GRANTED** and this action **DISMISSED** by separate order.

/s/ Curtis L. Collier
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

Tennessee Code Annotated

39-17-1307. Unlawful carrying or possession of a weapon. – (a)(1) A person commits an offense who carries with the intent to go armed a firearm, knife with a blade length exceeding four inches (4"), or a club.

(2) An offense under subdivision (a)(1) is a Class C misdemeanor, except it is a Class A misdemeanor if the person's carrying of a handgun occurred at a place open to the public where one (1) or more persons were present.

(b)(1) A person commits an offense who possesses a handgun and:

(A) Has been convicted of a felony involving the use or attempted use of force, violence or a deadly weapon; or

(B) Has been convicted of a felony drug offense.

(2) An offense under subdivision (b)(1) is a Class E felony.

(c)(1) A person commits an offense who possesses any deadly weapon with intent to employ it in the commission of or escape from an offense.

(2) An offense under subdivision (c)(1) is a Class E felony. [Acts 1989, ch. 591, § 1; 1990, ch. 1029, § 6.]

Tennessee Rules of Civil Procedure

RULE 7. INDICTMENTS, PRESENTMENTS AND INFORMATIONS

(a) General Provision. The definition, form, use, return, endorsements, content, and procedure relating to indictments, presentments and criminal informations shall be as provided by law.

(b) Amendments of Indictments, Presentments and Informations. An indictment, presentment or information may be amended in all cases with the consent of the defendant. If no additional or different offense is thereby charged and no substantial rights of the defendant are thereby prejudiced, the court may permit an amendment without the defendant's consent before jeopardy attaches.

(c) Bill of Particulars. Upon motion of the defendant the court may direct the filing of a bill of particulars so as to adequately identify the offense charged.